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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/524,056	09/26/2005	Benjamin Gavish	3394P019	4443

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7590 12/22/2010

EXAMINER
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SORIANO, BOBBY GILES

ART UNIT	PAPER NUMBER
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3769

MAIL DATE	DELIVERY MODE
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12/22/2010

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/524,056	<b>Applicant(s)</b> GAVISH, BENJAMIN	
	<b>Examiner</b> Bobby Soriano	<b>Art Unit</b> 3769	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 15 May 2009.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) See Continuation Sheet is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) See Continuation Sheet is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 08 February 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                       | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948)    | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>8/22/05; 10/06/06; 6/14/10</u>                                | 6) <input type="checkbox"/> Other: _____                          |

Continuation of Disposition of Claims: Claims pending in the application are 1,8,26-30,33,35,36,40,42,43,46,48,51,53,54,56,63,64,82,84,87,89,90,94,102,107,108,110,117,118,136,141,146 and 169-217.

Continuation of Disposition of Claims: Claims rejected are 1,8,26-30,33,35,36,40,42,43,46,48,51,53,54,56,63,64,82,84,87,89,90,94,102,107,108,110,117,118,136,141,146 and 169-217.

## **DETAILED ACTION**

### **Election/Restrictions**

Applicant's election without traverse of Group I, independent claims 1, 169, and 110 and claims dependent therefrom in the reply filed on May 15, 2009 is acknowledged. However it is the Examiner's position that the restriction filed by the previous Examiner was improper.

Although the previous Examiner's assertion that "the method as claimed can be practiced by another and materially different apparatus or by hand" is correct, the previous Examiner did not meet the requirements necessary to establish a serious search and examination burden (see MPEP 808.02). Specifically the withdrawn method of claim 56 and claims dependent therefrom would still pertain to subject matter very similar to the apparatus of claim 1, and the lack of a "memory element" in the method does not differentiate the subject matter substantially enough to warrant a search in a different class and/or require different prior art than the apparatus claimed. Accordingly the restriction is withdrawn and claims 56 and claims dependent therefrom will be examined.

As mentioned above the Examiner notes the method comprises substantially the same subject matter as the apparatus claimed. Therefore its examination in conjunction with the apparatus does not present a serious burden at this time and as such, no restriction is required. However, if subsequent amendments to the claims result in diverging subject matter deemed to increase the burden, the Examiner reserves the right to restrict at that time.

### **Information Disclosure Statement**

Applicant should note that the large number of references in the attached IDS have been considered by the examiner in the same manner as other documents in Office search files are considered by the examiner while conducting a search of the prior art in a proper field of search. **See MPEP 609.05(b).** Applicant is requested to point out any particular references in the IDS which they believe may be of particular relevance to the instant claimed invention in response to this office action.

### **Specification**

The specification has not been checked to the extent necessary to determine the presence of all possible minor errors. Applicant's cooperation is requested in correcting any errors of which the applicant may become aware in the specification.

### **Claim Rejections - 35 USC § 112**

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 30 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In particular the claim recites the limitation "wherein the apparatus is adapted to receive the event signal prior to generation of the time-varying stimulus by the stimulus unit" (emphasis added). It is unclear to the Examiner as to what component of the apparatus, either

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the memory or stimulus unit, that achieves said functional limitation. The Applicant is recommended to either amend the claim limitation to a more specific component or provide reasons as to why the claim limitation is not indefinite.

### **Claim Rejections - 35 USC § 101**

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claim 110 and claims dependent therefrom are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. In particular claim 110 recites a computer software product comprising “a computer-readable medium.” However the broadest reasonable interpretation of a claim drawn to a computer readable medium covers both non-transitory and transitory forms of media (i.e. a carrier signal). A signal per se is non-statutory subject matter, and therefore does not constitute a machine, manufacture, composition, or process. The Applicant is requested to amend the claim language to recite “a non-transitory computer-readable medium” or similar claim language (see 1351 OG Notice 212).

### **Claim Rejections - 35 USC § 102**

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

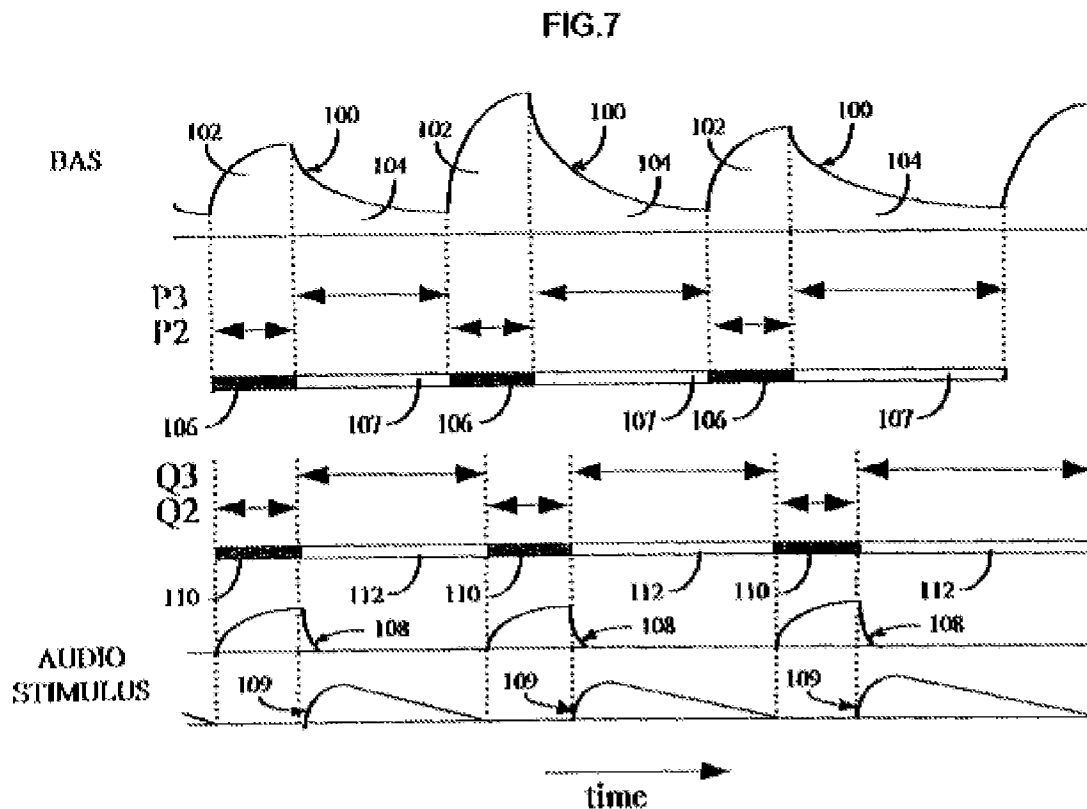
A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

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**Claims 1, 8, 26-30, 33, 35-36, 40, 42-43, 46, 48, 51, 53-54, 56, 63-64, 82, 84, 87, 89-90, 94, 102, 107-108, 110, 117-118, 136, 141, 146, and 169-217 are rejected under 35 U.S.C. 102(b) as being anticipated by Gavish US Patent Number 6,090,037 (as cited in Applicant's IDS).**

Note the claims are organized in their relative subject matter, and may not necessarily follow numerical order.



With regards to claim 1, Applicant's own prior art discloses a stimulus unit providing audio stimulus to adjust the ratio between inspiration and expiration of a user (see Fig. 7 above as described in column 7 line 56 to column 8 line 14). The audio stimulus can be responsive to ongoing measurement or alternatively not responsive to ongoing measurement by being

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manually controlled by the operator (column 1 lines 38-42 and 46-50 and column 6 lines 3-6, 33-37, and 58-67). Each audio stimulus comprises a multi-phase pattern (see above wherein each phase of the respiratory cycle is represented by black and white bars 110 and 112). Furthermore each audio stimulus varies over time in the form of progressively changing patterns until the user's respiratory signal matches the desired stimulus pattern (column 8 lines 33-51). The system further comprises a storage device for storing biorhythmic activity and patterns for modifying said activity (column 5 lines 45-54 and column 10 lines 47-55).

Independent claims 56, 110, 169 and claims dependent therefrom are rejected for substantially the same subject matter as disclosed in the apparatus of independent claim 1. The computer product of independent claim 110 and associated dependent claims encompasses the same functional limitations of the stimulus unit disclosed in independent claim 1 and claims dependent therefrom. Likewise the method steps of claim 56 are performed by the apparatus of claim 1, and are rejected for the same cited passages disclosed in Gavish.

Dependent claim rejections:

With regards to claims 8, 63, and 117 column 5 lines 45-54 and column 10 lines 47-55 disclose a storage device for storing biorhythmic activity and patterns for modifying said activity.

With regards to claim 26, 27, 35, 54, 64, 118, 172, and 183 Fig. 1 driver 16 determines and generates musical stimulus in accordance to received biorhythmic activity and/or operator configuration (column 6 lines 25-67 and column 7 lines 1-19).



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With regards to claims 36, column 3 line 66 to column 4 line 18 describes a general purpose monitoring device. The device receives sensor signal inputs to compute output indications representing pattern components of the sensed biorhythmic activity.

With regards to claims 40, 42, 43, 46, 48, 51, 53, 94, 102, 107, 108, 146, 175-180, 187-195, 196, 199, 204-210, and 214-216 the claims are directed towards the storage and modification of initial respiratory biorhythmic activity by adjusting the respiratory inspiration to expiration ratio using a series of progressively changing respiratory stimulus patterns. Gavish discloses this in Fig. 7 and column 7 line 56 to column 8 line 14 as cited in independent claim 1 above and Fig. 8 and column 9 line 58 to column 10 line 41 that mentions adjusting the relationship between inspiration and expiration values.

With regards to claims 28, 29, 82, 136, 185 and 201 the claims are directed towards the same limitation of claim 1 wherein the time-varying stimulus is not responsive to a measurement of a physiological variable. The claims are therefore are rejected similarly to the limitation in claim 1, wherein manual control of stimulus adjustment is performed by the operator as opposed to automatic adjustment according to measurement response.

With regards to claims 30, 174, 84, 186, and 201-203 the claims are directed towards having stimulus adjusted response to a measurement of a physiological variable (Gavish column 1 lines 38-42).

With regards to 33, 87, 89, 90, 141, and 217 the claims are directed towards providing an interface to allow an operator to select modification parameters for specific exercise routines. Gavish column 13 line 38 to column 14 line 17 discloses an example in which an operator selects parameters for improving breathing technique during Yoga exercises.

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With regards to claims 173, 184, and 200 directed towards applying a pressure stimulus, Figs. 11A and 11B of Gavish disclose a pressure application device for providing pressure stimulus.

With regards to claims 170, 171, 181, 182, 197, and 198 the claims are directed towards linearly and geometrically adjusting the time-varying stimulus provided to the user. Gavish column 6 lines 58-67 indicate that determining stimulus strategy by the driver includes adjusting shape, color, dynamics, intensity and complexity of the visual stimulus.

### **Conclusion**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Bobby Soriano whose telephone number is (571)270-7030. The examiner can normally be reached on Monday thru Friday, 10:30am to 6:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Henry Johnson III can be reached on 571-272-4768. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Bobby Soriano/  
Examiner, Art Unit 3769

/Eric F Winakur/  
Primary Examiner, Art Unit 3777

December 13, 2010